

Decision **DRAFT DECISION OF ALJ THOMAS** (Mailed 10/31/2003)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of PACIFIC GAS AND ELECTRIC COMPANY (U 39 M), a California Corporation, and THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF UNION CITY for an Order Authorizing the Sale and Conveyance of a Certain Parcel of Land in Alameda County Pursuant to Public Utilities Code Section 851.

Application 03-08-002  
(Filed August 5, 2003)

**OPINION GRANTING APPLICATION  
BUT DEFERRING GAIN ON SALE ISSUE**

**Summary**

We grant Pacific Gas and Electric Company's (PG&E) application pursuant to Pub. Util. Code § 851 to sell a parcel of land to the Community Redevelopment Agency of the City of Union City (Union City), California.<sup>1</sup> We find that adequate attention has been paid to the environmental effects of the sale and related demolition and site remediation work and that we need not do further analysis under the California Environmental Quality Act (CEQA). In response to parties' comments on the draft decision, we defer determination of the proper

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<sup>1</sup> The parcel at issue is identified in the purchase and sale agreement attached as Exhibit A to PG&E's application as "that certain parcel of real property located in the City of Union City, County of Alameda and State of California, identified by the Alameda County Assessor as Assessor's Parcel Map 087-0019-004-02 [and] the State Board of Equalization as . . . SBE No. 135-1-346-1."

allocation between PG&E's ratepayers and shareholders of the gain on sale PG&E will realize upon conveyance of the property.

## **Background**

### **A. The Property**

PG&E asks us to approve a sale and conveyance of a parcel of land located in Alameda County, California to Union City. PG&E bought the property in 1952 for \$176,734, and is selling the property for \$18,076,000.

Union City will use the 28.3-acre parcel (and an adjoining parcel) for a redevelopment project that will include affordable housing, office development, a BART<sup>2</sup> transit hub, pedestrian walkways, and other community amenities. PG&E once used the property to house a natural gas pipe wrapping and storage facility. In 2002, it ceased use of the property and states that the property is no longer used by or useful to PG&E.

The property contains underground and aboveground electric distribution lines and underground natural gas pipelines and valves. It contains a warehouse building that PG&E has agreed to remove. PG&E also will remove the distribution lines serving the warehouse and the underground natural gas pipelines and valves, and will relocate three underground electric distribution lines. PG&E will retain easements for use of the distribution lines that will continue to be necessary for its provision of electric service. It has determined that these easements will allow it to retain all rights necessary for current maintenance and future operation of existing facilities, including the right to enter onto the property for maintenance purposes.

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<sup>2</sup> Bay Area Rapid Transit.

The property and the adjacent parcel have also been the subject of environmental remediation. The adjacent parcel, formerly owned by Pacific States Steel, was the subject of a federal district court clean-up plan and other litigation. Part of the court-approved plan is Union City's commitment to construct a major new street running through the PG&E property and connecting an adjacent road, Decoto Road, to the Pacific States Steel site.

The PG&E property will also be remediated. PG&E has agreed to participate in a clean-up project implemented by the California Department of Toxic Substances Control. PG&E has commenced remediation of the property, and will leave \$1.5 million in escrow upon the sale of the property to complete the remediation work.

#### **B. Gain on Sale and Related Accounting Issues**

PG&E calculates the gain on sale pre-tax at \$16,310,641 and the after-tax gain at \$9,664,707.<sup>3</sup> PG&E claims shareholders should receive this entire gain. It explains that the property consists of nondepreciable land, that ratepayers did not contribute to the initial acquisition of the property, and that PG&E has not recovered the purchase cost from ratepayers through depreciation.

PG&E asks that we either determine here that the gain on sale should accrue in its entirety to PG&E's shareholders, or that we defer the issue to the

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<sup>3</sup> PG&E also explains that the property consists only of non-depreciable land whose net book value (\$176,734) will be removed from rate base upon Commission approval and close of the sale. Based on annual property taxes of \$80,875, no annual operations and maintenance expense, and the Company's 2003 authorized cost of capital for distribution assets (11.22% on equity, 9.24% on rate base), PG&E estimates the 2003 revenue requirement for the property, including taxes, franchise requirements and provision for uncollectible accounts, to be \$105,215.

generic rulemaking on gain on sale issues that the Commission has indicated it will institute late in 2003.<sup>4</sup>

The Commission's Office of Ratepayer Advocates (ORA), the only party to protest the application,<sup>5</sup> opposes deferral of the gain on sale issue and instead urges us to find that all gains from the sale be allocated to ratepayers. It does not otherwise oppose the application. In an October 3, 2003 filing, ORA explained that ratepayers would suffer a hardship if this proceeding were bifurcated to defer the gain on sale issue because their just remedy would be deferred.

## **Discussion**

### **A. Section 851 Analysis**

The basic task of the Commission in a Section 851 proceeding is to determine whether the transaction serves the public interest: "The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers."<sup>6</sup>

We have reviewed the proposed agreement to sell the property to Union City and find it does not impair PG&E's ability to provide utility service to the public. PG&E will retain proper easements in order to maintain distribution plant that will remain on the property. It no longer needs the rest of the

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<sup>4</sup> PG&E cites Decision (D.) 03-04-032, *mimeo.* at 21, n.5.

<sup>5</sup> Union City filed a motion asking us to defer the gain on sale issue and we received several letters expressing support for deferral so that we might allow PG&E to conclude the sale, and Union City to proceed with its project, as soon as possible.

<sup>6</sup> D.02-01-058.

property, as it has discontinued the natural gas pipe wrapping and storage activities the site once housed.

The property will be cleaned up as a result of the sale, which also affords public benefits. Moreover, the use to which the property will be put will provide positive community benefits in Union City. While this latter benefit does not help ratepayers directly, it does help establish that sale of the property benefits the public interest.

We therefore find that the sale meets the requirements of Section 851.

## **B. Environmental Review**

CEQA<sup>7</sup> applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to “inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities.”<sup>8</sup>

Because the Commission must issue a discretionary decision (*i.e.*, grant Section 851 authority) without which the proposed activity cannot proceed, and because the activity has the potential to result in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment,<sup>9</sup> the application is subject to CEQA and the Commission must act as either a Lead or Responsible Agency under CEQA.

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<sup>7</sup> Public Resources Code Sections 21000, *et seq.*

<sup>8</sup> Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.

<sup>9</sup> CEQA Guideline § 15378.

The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole.<sup>10</sup> A Responsible Agency is required to consider the environmental consequences of a project that is subject to its discretionary approval, and in particular to consider the Lead Agency's environmental documents and findings before acting upon or approving a project.<sup>11</sup>

Union City's Redevelopment Agency (Agency) and the city council of Union City (City Council) prepared a proposal and conducted an environmental review that would (a) amend the City's 1988 Redevelopment Plan (Plan) to create an expanded project area, (b) change certain 1988 Plan time and financial limits, and (c) revise the list of proposed redevelopment programs and activities.

On September 24, 2001, the City Council and the Agency forwarded a Draft Environmental Impact Report (DEIR) to the State Clearinghouse (SCH #2000112010) and published the Notice of Availability in a local newspaper of wide circulation. The DEIR analyzed the proposed revisions to the Plan at a programmatic level, except for the five specific sub-projects proposed consistent with the original and revised Plan, which were also analyzed on a project level. Of the five projects, the proposed project subject to Section 851 review before the Commission is identified as "Specific Project 5: Intermodal Station District and Transit Facility Plan." On October 22, 2001, the City Council solicited oral comments on the DEIR at a public workshop during the 45-day public comment period.

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<sup>10</sup> *Id.*, § 15051(b).

<sup>11</sup> *Id.*, § 15050(b).

A Final Environmental Impact Report (FEIR) was prepared and made available on January 17, 2002, formally addressing all comments received on the DEIR. Throughout the process, the City Council sought to develop alternatives that would mitigate the impacts of the project to the greatest extent possible. The FEIR incorporates both resource impact mitigation measures and a monitoring program designed to reduce impacts to a less-than-significant level in a number of areas, including Land Use, Hydrology and Water Quality, Aesthetics, Biological Resources, Geology, Cultural Resources, and Public Facilities.

At the same time, the FEIR acknowledges that there are three areas where impacts cannot be mitigated to a less-than-significant level, including the cumulative effect of land developments on regional air quality (impact IMAQ-2); the exposure of noise sensitive land uses near the project site to construction noise (impact NOI-3 and NOI-2); and contribution by the project to degraded level of service on arterial roadways (impact TC-2 and IMTC-1).

On February 26, 2002, the City Council and the Agency held a joint public hearing on the amended plan. On March 12, 2002, the City Council adopted the Findings of Fact, including applicable Mitigation Measures, the Mitigation Monitoring and Reporting Program and a Statement of Overriding Considerations (Resolution No. 249-02, Exhibit A). A Notice of Determination was subsequently filed with the state Office of Planning and Research, in compliance with Sections 21108 and 21152 of the Public Resources Code.

We have reviewed and considered the DEIR, the FEIR, and the discretionary decision by the City Council, and find that these documents are adequate for our decision-making purposes under CEQA. We conclude that there is substantial evidence that none of the proposed alternative sites would avoid or substantially lessen any potential direct, indirect, or cumulative significant impacts of the project and that the alternative analysis complies with

the requirements of the Warren-Alquist Act and CEQA. We find that the City Council reasonably concluded that the proposed project, including the mitigation measures in the FEIR, is feasible and will avoid and/or reduce the majority of potential environmental impacts to less-than-significant levels.

Certain mitigation measures, as described in the FEIR, would lessen but not necessarily eliminate the potential adverse environmental effects associated with the project and that those impacts remain significant and unavoidable. These impacts were in the resource areas of Air Quality, Noise, Traffic, and Circulation.

We conclude that the City Council reasonably found that there were no other feasible mitigation measures or alternatives that the City Council could adopt which would reduce these impacts to less-than-significant levels. We conclude that the City Council reasonably found that to the extent that these impacts could not be substantially lessened or eliminated, specific economic, legal, social, technological, or other considerations and project benefits identified in the Statement of Overriding Considerations supported approval of the project, including providing for a balance of development options, economic growth, and quality of life benefits.

### **C. Gain on Sale**

In response to the parties' comments, we find that it would be most efficient to defer the issue of gain on sale to our upcoming rulemaking on gain on sale issues. In the draft decision, we found that ratepayers and shareholders should each receive 50 percent of the gain from the sale of the property. However, both sides disagreed drastically about the correctness of that decision, with ORA seeking the entire gain for ratepayers, and PG&E seeking the entire



gain for shareholders. We do not believe it would be appropriate to resolve this dispute in this context.

The Commission stated in D.03-04-032 that it would open a gain on sale rulemaking this year “depending on Commission resources and priorities.” While the latter phrase indicates that such a proceeding is not certain this year, we fully intend to open a proceeding to address the issue generically in the near future, most likely in the first quarter of 2004. We therefore defer determination of the gain on sale allocation appropriate for this case to our generic proceeding. We will close this application.

We are deferring the issue to our general rulemaking in part because of the need to resolve the underlying land sale in an expeditious manner. Both PG&E and Union City (as well as a legislator, a federal judge and a number of community organizations)<sup>12</sup> have indicated that the overall redevelopment project will be delayed if this decision is delayed. While much of this is a problem of PG&E’s own making since it did not file its application until August 5, 2003, we are sensitive to the strategic value of the PG&E parcel to the whole redevelopment scheme.

We will close this application now. Once we have articulated a test in the context of that rulemaking that applies to the situation before us here, PG&E shall file a new application seeking allocation of the gain on sale. In the meantime, neither shareholders nor ratepayers will receive the proceeds from the sale. Rather, the proceeds should be held by PG&E in its Real Property

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<sup>12</sup> These letters are not part of the record of this matter but appear in the Commission’s correspondence file. We may rely on them if they corroborate claims in the record.

Gain/Loss on Sale Memorandum Account, and accrue interest until we determine the appropriate allocation of the gain on sale for this transaction.

**Assignment of Proceeding**

Geoffrey F. Brown is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge (ALJ) in this proceeding.

**Comments on Draft Decision**

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. PG&E and ORA filed comments on November 20, 2003, ORA filed supplemental comments in response to the request of the ALJ on November 21, 2003, and PG&E, ORA, and the Community Redevelopment Agency of the City of Union City filed reply comments. All parties support approval of the transaction, but differ only on whether to defer the gain on sale determination and how to allocate the gain on sale. As stated above, we opt to defer the issue so that the transaction may proceed without delay.

**Findings of Fact**

1. PG&E bought the property in 1952 for \$176,734, and is selling the property for \$18,076,000.
2. Union City will use the 28.3-acre parcel (and an adjoining parcel) for a redevelopment project that will include affordable housing, office development, a BART transit hub, pedestrian walkways, and other community amenities. PG&E once used the property to house a natural gas pipe wrapping and storage facility.
3. In 2002, PG&E ceased use of the property.
4. PG&E will retain easements over the property for use of the distribution lines that will continue to be necessary for its provision of electric service. The

easements will allow PG&E to retain all rights necessary for current maintenance and future operation of existing facilities, including the right to enter onto the property for maintenance purposes.

5. PG&E has agreed to participate in a clean-up project implemented by the California Department of Toxic Substances Control. PG&E has commenced remediation of the property, and will leave \$1.5 million in escrow upon the sale of the property to complete the remediation work.

6. The gain on sale of the property is \$16,310,641 before taxes and \$9,664,707 after taxes.

7. The City Council of the City of Union City is the Lead Agency for the proposed project under CEQA.

8. The City Council prepared an EIR for the project, which found that (a) the proposed project, the mitigation measures applicable to the project, and the Mitigation Monitoring Program avoids and/or reduces the majority of potential environmental impacts of the project to less-than-significant levels; (b) there is substantial evidence in the record that each of the identified alternatives is infeasible because they would not allow the project to achieve its basic objectives nor accomplish the goals and policies of the City Council Redevelopment Plan and other adopted City Council policies; (c) certain mitigation measures as described in the FEIR would lessen but not necessarily eliminate the potential adverse environmental effect associated with the project and that those impacts in the areas of Air Quality, Noise, Traffic, and Circulation remain significant and unavoidable; and (d) there were no other feasible mitigation measures or alternatives which would reduce these impacts to less-than-significant levels.

9. On March 12, 2002, the City Council exercised its discretionary authority and subsequently adopted the FEIR, including applicable Mitigation Measures,

the Mitigation Monitoring and Reporting Program, and a Statement of Overriding Considerations (Resolution No. 249-02, Exhibit A).

10. The California Public Utilities Commission (CPUC) is a Responsible Agency for the proposed project under CEQA.

11. Consistent with the City Council's findings and determinations, we find that, (a) the proposed project, the mitigation measures applicable to the project, and the Mitigation Monitoring Program avoids and/or reduces the majority of potential environmental impacts of the project to less-than-significant levels; (b) there is substantial evidence in the record that each of the identified alternatives is infeasible because they would not allow the project to achieve its basic objectives nor accomplish the goals and policies of the City Council's redevelopment plans and other adopted regional policies; (c) certain mitigation measures as described in the FEIR would lessen but not necessarily eliminate the potential adverse environmental effects associated with the project; (d) impacts in the areas of Air Quality, Noise, Traffic, and Circulation remain significant and unavoidable; and (e) there were no other feasible mitigation measures or alternatives which would reduce these impacts to less-than-significant levels.

### **Conclusions of Law**

1. We should grant PG&E's application pursuant to Pub. Util. Code § 851 to sell a parcel of land to Union City, California.

2. The proposed agreement does not impair PG&E's ability to provide utility service to the public and provides positive public benefits.

3. The property at issue is no longer used by or useful to PG&E.

4. The EIR and the discretionary Decision by the City Council are adequate for the CPUC's decision-making purposes as a Responsible Agency under CEQA.

5. We should adopt the City Council's Mitigation Monitoring Program and Statement of Overriding Considerations for purposes of our approval.

6. We should defer determination of how to allocate the gain on sale between ratepayers and shareholders to our upcoming generic rulemaking on the subject.

**O R D E R****IT IS ORDERED** that:

1. We grant Pacific Gas and Electric Company's (PG&E) application pursuant to Pub. Util. Code § 851 to sell a parcel of land to the Community Redevelopment Agency of the City of Union City (Union City), California identified by the Alameda County Assessor as Assessor's Parcel Map 087-0019-004-02.

2. We adopt the City Council of Union City's Mitigation Monitoring Program and Statement of Overriding Considerations for purposes of our approval.

3. We defer decision on allocation of the gain on sale from the property between PG&E's shareholders and ratepayers to our upcoming generic rulemaking on gain on sale issues.

4. Once we have articulated a test in the context of that rulemaking that applies to the situation before us here, PG&E shall file a new application seeking allocation of the gain on sale from this transaction. In the meantime, neither shareholders nor ratepayers shall receive the proceeds from the sale. Rather, the proceeds should be held by PG&E in its Real Property Gain/Loss on Sale Memorandum Account, and accrue interest until we determine the appropriate allocation of the gain on sale for this transaction.

5. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.